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DISCRETIONARY CHARITABLE BEQUESTS.

CHARITABLY disposed persons, having no definite choice as to objects, often leave funds by will to an executor or trustee, with power in him to dispose of the amount to such charitable objects or purposes as he may think most deserving, or may for any reason prefer; and the question frequently arises, What becomes of such a fund? Is the bequest a valid one, or does it devolve upon the heirs at law or next of kin, as not being sufficiently and legally disposed of by will?

First. It clearly does not belong to the executor or trustee himself. He has no *personal* interest in the legacy. He holds it merely as trustee, although the words "in trust" may not be used in the will. The whole language imports a trust; and a court of equity could compel him, if living, to distribute it to *some* charities, he of course having the selection. His discretion cannot be taken away, but he can be compelled to exercise it. This is practically accomplished by an order of the court that such trustee report a "scheme for distribution," according to his own judgment, to be sure, but to be approved by the court, in order to secure, beyond peradventure, its appropriation to charitable purposes: *Nichols* v. *Allen*, 130 Mass. 211; *Schouler, Petitioner*, 134 Mass. 426; *White* v. *Ditson*, 140 Mass. 351; *Ommaney* v. *Butcher*, Turn & Russ. 260.

Second. Does it go to the testator's heirs, or will the court administer it to some charities?

In England undoubtedly such a fund would be distributed

to charities. No sum once legally and sufficiently devoted to "charity" by a testator is ever allowed to reach the heirs under any possible circumstances. It is established in that country that by giving it to charity, the owner intended that at all events his heirs should *not* have it; that clearly he meant to take it away from them whatever might become of it; and if, for any reason, by the rules of law, the exact wishes of the donor cannot be carried out, the law or equity will find some other charitable objects on which to bestow it.

This may or may not seem reasonable and just to the American legal mind of the present day, but it is, no doubt, the established English law.

In some American States such devises, at least where the executor or trustee has only a power, and not a legal interest, are apparently considered absolutely void, and although the executor or trustee in good faith selects some proper charitable object and attempts to exercise the power apparently conferred upon him by the will, by actually distributing the fund to such objects as he approves, all such appropriations of the funds are held illegal, and the heirs of the testator are allowed to recover the same, either of the executor himself, or from those on whom he has bestowed it.

In *Lepage* v. *McNamara*, 5 Iowa, 124 (1857), the devise was to the testator's widow for life, and at her death "I direct and authorize the Rt. Rev. Bishop Loras, or his successors, to dispose of my real estate, and apply so much thereof to the church or to the education or maintenance of poor children, as he in his wisdom may think proper and legal." After the widow's death Bishop Loras conveyed by deed a portion of the estate to the defendants. *Held*, that they took no title, but that the heirs at law could recover the same in a real action against the Bishop's grantees.

In *Bristol* v. *Bristol*, 53 Conn. 242 (1885), a testator gave all the rest and residue of his estate to certain trustees named, as a permanent fund, the income of which was to be applied as follows: three-quarters to certain specified charities, and as to the other quarter the will said, "I authorize, empower, and direct my wife to permanently dispose of the same for such charitable purposes as she may deem proper." She did in writing desig-

nate certain charitable institutions as beneficiaries of the fund. *Held*, nevertheless, that the bequest was void and went to the heirs at law as an intestate estate: And Judge Loomis said, p. 256: "Whatever might be held by the courts of England, or of those States which have adopted the English doctrine on this subject, it is very clear that under our own decisions, which have established a definite rule on the subject in this State, this bequest cannot be held valid. It is well established with us that a gift to a charitable use must designate the particular charitable use by making the gift to some charitable corporation whose charter provides for a charitable use of its funds, or to some particular object or purpose that the law recognizes as charitable. It is enough if the object be mentioned, and the law can see that it is a charitable one; but it is not enough that the gift be merely 'to charitable uses' or 'to be used in charity,' so long as no selection is made from the long list of recognized charitable objects. And it is not enough that some person is named to whom is given the power of naming the charity. That is the testator's own matter. It is his intent that is to determine that. If he chooses to leave the matter wholly to the discretion of some person named, he can do so by making the gift to him, leaving him to use his discretion as to the disposition of it. In this case the donee takes absolutely, and the law does not trouble itself as to whether he acts conscientiously in the matter. The testator has chosen to leave the matter to uncertainty, and there the law leaves it. The charitable object, thus required to be named, may be a benefit to a class of persons and therefore uncertain as to the particular persons of the class that are to receive the benefit. This uncertainty may make the bequest void, unless there is a power given to some person or corporation to make a selection of the individuals: *White* v. *Fisk*, 22 Conn. 50; *Adye* v. *Smith*, 44 Id. 70; *Fairfield* v. *Lawson*, 50 Id. 513; *Coit* v. *Comstock*, 51 Id. 379; *Tappan's Appeal from probate*, 52 Id. 412. Here the power given the widow is not to select the particular beneficiaries of a class named, but to select the charity itself. We think that to uphold this bequest, we should have to go beyond the utmost limit to which we have gone in upholding charitable gifts. The bequest being of such a character, it clearly cannot be saved by the act of the widow in mak-

ing a written designation of the charitable purposes which by it she is authorized to select."

Other States, where the English law of charities is more fully adopted, hold such bequests, though indefinite, not illegal, and if the executor or trustee, in his lifetime, duly selects certain charitable objects and transfers the property to them, they take an indefeasible and perfect title, and the heirs at law of the testator have no claim either against the executor for such disposition of the estate, or the recipients of the bounty: *Zeisweiss* v. *James*, 63 Penn. St. 465.

But suppose the executor or trustee dies without ever having made any selection or designation of any charitable object or purpose, what becomes of the legacy then? Does it in such event revert to the heirs or next of kin of the testator, or can it be by some other power still applied to charitable objects to be otherwise selected or designated? No doubt in England this can be done, since, as we have before stated, no gift intended for charity is there ever allowed to fail. Whether the same rule prevails in America may depend, in part at least, upon the answer to another question, viz.: Is this done in England by a Court of Equity, in its ordinary capacity as a Court of Chancery, or does the Lord Chancellor, on behalf of the Crown, as Parens Patriæ, seize and hold it, as the general constitutional trustee for all charities, and distribute it according to the order and direction of the sovereign as he by his sign manual may direct? If the latter be the English method, it is quite certain that in America the legacy would go to the heirs of the testator, since no court in America has this prerogative power. It is not a judicial power at all, but wholly a ministerial one.

To be sure, the Chancellor in England makes his order for such distribution, but it is only because he is the keeper of the King's conscience, and his mouth-piece, as it were, for this purpose, and the King himself, by his proper officer, sends his letters missive to the court, indicating how it should be distributed. That our courts do not possess this extraordinary power is universally agreed, whatever other differences exist in regard to the law of charities in the different States. See *Fontain* v. *Ravenel*, 17 How. 369; *Jackson* v. *Phillips*, 14 Allen, 576, Gray, J.; *Dickson* v. *Montgomery*, 1 Swan, 348; *Grimes* v. *Harmon*, 35 Ind. 230;

Lepage v. *McNamara*, 5 Iowa, 146; *Moore* v. *Moore*, 4 Dana, 366.

This carries us back to the question, when does an English court administer a charitable legacy, by virtue only of its extraordinary power, on behalf of the Crown, and not as a Court of Equity merely? In five well marked classes of cases:

1. Where the gift is for some illegal object.

2. When the specific charitable object mentioned in the will is not in existence.

3. Where the bequest is positively declined.

4. Where the legacy is wholly indefinite, and the will provides no means of making it definite.

5. When the will is in terms indefinite, but points out some means of making it definite, which means wholly fail before the event takes place.

1. *When the gift is for some unlawful purpose.*

This will best appear from a few illustrations. Thus in *Rex* v. *Lady Portington*, 1 Salk. 162 (1693), the devise was to Lady Portington, "for the good of the testator's soul." It was held to be void, as being for a "superstitious use;" but that the legacy should not go to the heirs, since "the King shall order it to be applied to a proper use." In *Da Costa* v. *De Pas*, 1 Ambl. 228; 2 Swanst. 489, note; 1 Dick. 258; 2 Ambl. 712, a legacy of 1,200 pounds was given to establish a "Jesuba," or assembly for reading the Jewish law and educating people in the Jewish religion. This was also declared to be, at that time, illegal, and was disposed of by the Crown, 1,000 pounds of it being given to the Foundling Hospital in London. In *Isaac* v. *Gompertz*, cited in 7 Ves. 61 and Ambl. 228, note, an annuity of 40 pounds a year was given for the support and maintenance of a Jewish synagogue; which being supposed to be in conflict with Christianity and therefore illegal, it was ordered by the court that the Attorney-General "apply to the King for a sign manual to appoint and direct to what charitable uses said annuity shall be appropriated." In *Cary* v. *Abbot*, 7 Ves. 490 (1802), before Sir WILLIAM GRANT, Master of the Rolls, a legacy for educating poor children in the Roman Catholic faith was thought to be illegal, and was administered under the King's sign manual to other charities. So in *Attorney-General* v. *Todd*, 1 Keen,

803 (1836), a devise for the support of a Roman Catholic priest met with like fate. See, also, *Sims* v. *Quinlan*, 16 Irish Ch. R. 191 (1864). No doubt under or since the enabling acts in Great Britain, some if not all the aforesaid bequests would now be held valid and go to the purposes named; and in America, no doubt, they would be held good without any special statutes on this subject. For in this country, where no religious denomination, doctrine, or form of worship is forbidden by law, so long as the public peace is not disturbed, there is no such thing as a "superstitious use," and bequests of this kind would not for that reason be invalid. See *Methodist Church* v. *Remington*, 1 Watts, 218; *Gass* v. *Wilhite*, 2 Dana, 170; *Hughes* v. *Daly*, 49 Conn. 34; *Magill* v. *Brown*, Brightly, 373; *Ex parte Schouler*, 134 Mass. 426; *Quinn* v. *Shields*, 62 Iowa, 129.

Second. The second class of cases is where the specific object of charity stated in the bequest is not in existence or cannot be identified.

Thus, in *Simon* v. *Barber*, Tamlyn, 14 (1829), the legacy was given "to the Guernsey Hospital, to be applied toward carrying on the charitable designs of said corporation." There was no hospital by that exact name in the island of Guernsey, though there were two hospitals of a somewhat similar name; but the master to whom the case was referred, having reported that he was unable to determine what hospital the testator meant, the Master of the Rolls said—"The Guernsey Hospital, the particular charitable object of the testator, has failed, but it remains with the Crown to signify to what charitable purposes this fund shall be applied. Whenever a charitable object fails, from whatever cause, the Crown has a right to interfere." *Sandford* v. *Gibbons*, 3 Hare, 195, note (1829), and *Thorley* v. *Byrne*, Id. (1830), are exactly like it. See also *Loscombe* v. *Wintringham*, 13 Beav. 87, 7 Eng. L. & Eq. 164 (1851).

Third. So, too, where the bequest is declined by the charitable institution to which it was given. In *Denyer* v. *Druce*, Tamlyn, 32 (1829), 2,000 pounds was given to the University of Oxford, and 40 pounds per annum to another institution, which being declined, Sir JOHN LEACH said—"The legacy of 2,000 pounds and the annual payment of 40 pounds having been refused by the charitable institutions on which the testatrix conferred them,

those bequests have consequently failed. It results, therefore, that it rests with the Crown to direct the charitable purposes to which they shall be applied."

Fourth. When the gift is wholly general, indefinite in its terms, and points out no specific object or class of objects, and names no person authorized to select any objects, as of a gift merely to "charitable purposes."

Thus, in *Attorney-General* v. *Matthews*, 2 Lev. 167 (1675), the gift was to certain persons, in trust, "for the poor in general, forever." Lord Nottingham held "that the Commissioners of Charitable Uses have nothing to do with it, but it was to be determined by the King himself in this court, upon an information by the Attorney-General in behalf of the King." And afterward, "the King directed it should be given to the maintenance of the mathematical scholars in Christ's Hospital." The same case apparently is reported in Finch, 245, under the name of *Attorney-General* v. *Peacock*. In *Clifford* v. *Francis*, Freem. 330 (1679), the devise was simply "to pious uses," and the rule is thus stated: "When money is given to a charity without expressing what charity, then the King is the disposer of the charity, and a bill ought to be preferred in the Attorney-General's name for that purpose; but if the charity be expressed, then it is in the power of the Commissioners for Charitable Uses." In *Attorney-General* v. *Baxter*, 1 Vern. 247 (1648), the gift was of 600 pounds to John Baxter, the author of the Saints' Rest, to be distributed by him amongst sixty pious ejected ministers. On account of the vagueness and generality of the gift, the King, on the information of the Attorney-General, ordered it to be given to Chelsea College. Although this decree was afterward reversed in 2 Vern. 105, on the ground that Mr. Baxter had the power to select the ministers and so it could be made certain, and was therefore valid, yet the principle that the Crown had the sole power of distributing general legacies was not impugned. In *Attorney-General* v. *Herrick*, 2 Ambl. 712 (1772), the devise was to the defendant Herrick and others, upon trust, to be applied to "charitable and pious uses." The Lord Chancellor (APSLEY) said, "There is no objection to the uncertainty of the object, for the King may appoint," and he added, "that he had concluded to apply to his Majesty, as

Lord Nottingham did in *Attorney-General* v. *Peacock*." And this was done and a decree made accordingly. In *Ware* v. *Attorney-General*, 3 Hare, 195, note (1824), the testator devised all the rest and residue "to the poor." Declaration that the residue ought to be disposed of in charity, "as his Majesty shall be pleased to direct," and decree was made "that it be transferred and paid to such person or persons as his Majesty by royal sign manual should be pleased to appoint. One of the most recent and interesting cases under this head is that of *Kane* v. *Cosgrave*, 10 Irish R. Eq. 211 (1876). Peter Doyle by his will left 1,400 pounds "all to be given for charitable purposes," but clothed no one with the power of selection. His executor filed a bill for the administration of assets, and suggested a scheme for its distribution. The court declared they could not distribute a fund bequeathed for charitable purposes generally, or approve of a scheme respecting it, unless authorized to do so by letters missive under the sign manual. And the mode of obtaining such royal assent, and the exact form of the letters missive in such cases, is fully set out in the report. This is a very instructive case, and seems to render unnecessary any further discussion of this branch of the subject.

Having thus laid the foundation we come directly to the question, what is the effect of the executors or trustee's death, without having selected any objects of charity? Let us consider the cases which bear immediately upon the proposition thus involved.

Fifth. Where the gift is general in its own terms, but points out some mode by which specific objects may be selected, as by giving a discretion to some person or persons, and such mode of selection entirely fails. Here also the English Courts do not supply the missing discretion by distributing the fund upon a scheme of their own, but turn over the fund to the King to be appropriated under his sign manual. It may be the line has not always been drawn distinctly, for whether the fund is distributed by the court or by the Crown, the result is the same to the heirs, and the *mode* of distribution is unimportant; and the main question often discussed, is whether the fund goes to charity or to the heirs, and if to the former, the mode or manner of the distribution is not much, if at all, considered. But the

general drift of the cases is plain. Let us consider a few of them.

In *Attorney-General* v. *Syderfen*, 1 Vern. 224, cited in 7 Ves. 43 note (1683), the bequest was of one thousand pounds, "to be applied to such charitable uses as he (the testator) had by writing under his hand formerly appointed." After the testator's death, no such writing could be found.

The Ld. Keeper, GUILFORD, said, "It is no question but the charity being now general and indefinite (this writing not being found) the application of this money is now in the King." And by his order, it was given to the mathematical boys in Christ's Hospital. The same principle was involved in the subsequent case of *Attorney-General* v. *Berryman*, Dick. 168 (1755) in which C. by will gave five hundred pounds "to be disposed of in charity at the discretion of Dr. Berryman." Dr. Berryman never disposed of any of the fund in his lifetime, but at his death, directed in his will that his brother, the defendant, should dispose of it at *his* discretion. The executor of the testator filed a bill for instructions to know whether he could safely pay over the money to the defendant. Ld. HARDWICKE, the most consummate equity judge that ever sat in an English Court of Chancery, held the legacy to be a good and subsisting legacy for charity; "but as Dr. Berryman had not executed the trust reposed in him, it rested with the Crown, and therefore recommended it to the parties to apply to his Majesty to dispose of the legacy." This was done and the legacy distributed accordingly. This seems to be a direct answer to the question under consideration, and has never been doubted, so far as our researches extend. In *Attorney-General* v. *Fletcher*, 5 Law J. Ch. (N. S.) 75 (1835), the testatrix bequeathed "the rest and residue of her estate to her sister Ann, but the principal and interest of several annuities as they fell in, she gave to charitable purposes which should thereafter be specified, or in default of which, according to the best judgment of the Rev. Dr. John Maddy, the sole executor of her last will." The testatrix died without having specified any charitable purposes, and Dr. Maddy renounced probate of the will and declined the trusts, but proposed to nominate the charitable objects of the bequest. *Held*, that he could not do so, but that "the disposition was not

by a scheme, but it ought to be disposed of in charity, in such a manner as the King, by sign manual might direct." So in *Re Dickason*, 3 Hare, 195, note (1837), there was a bequest "to ten such charities as the testator should name, one hundred pounds to each. If he should not name them, then the executors to make the disposition." The testator did not name any charity and the executors declined to act. It was ordered that the executors pay the residue of one thousand pounds "to such persons as her Majesty should by sign manual appoint for the use of such charities, and in such proportions, as her Majesty should under her royal sign manual appoint."

A comparatively recent case in Ireland illustrates the English law in the class of charities we are now considering with great distinctness. There a testator bequeathed his estate "to William Russell to be by him applied for such pious purposes and uses as should appear to him most conducive to the honor and glory of God, and the salvation of my soul." Upon argument, the bequest was held valid in its nature as a charitable bequest, and *by consent of the trustee* it was referred to a Remembrancer to report a scheme of distribution, but before he made a report, the trustee died. The court decided that although they had thus far acted as a Court of Equity by consent of the trustee, yet that his death entirely changed the case, and that after his death, the distribution of the charity belonged to the Crown: *Felan* v. *Russell*, 4 Irish Eq. R. 701; Longf. & Towns. 674 (1842). The argument is better reported by the first reporter, the judgment by the latter. The case is also much in point upon the case supposed. Here the trustee having the discretionary power of selection, died before his scheme of distribution was fully settled upon; in the case supposed, he dies before any plan is attempted. The result reached in these cases cited under this fifth head, seems to be a logical consequence from the rule so well established by the cases cited under the fourth head. For what practical difference can there be, between a bequest absolutely indefinite in the first instance, and one which becomes so by matter *ex post facto*, and before any action taken to carry the bequest into effect? In *Moggridge* v. *Thackwell*, 7 Ves. 83 (1802), Ld. ELDON declared that it was "very difficult to raise a solid distinction between them." Might he not have used

still stronger language? If a legacy is given "to A. B. for charitable purposes" and stops there, without doubt an English court could administer it only under the sign manual. But if it be to A. B. for such charitable purposes as he may select, and A. B. dies before he sees fit to dispose of any of the fund, the additional clause becomes entirely inoperative and impossible, and the same indefiniteness now arises by the death of A. B. as would have existed had he never been named as trustee, or never had any discretion given him to distribute the fund. We may reach the same result by a somewhat different path. It seems obvious that the language used by the testator in the supposed case indicates a personal trust and confidence in the discretion of A. B. Now it is a well settled principle of the law of trusts, that if a gift is dependent upon the discretion of one trustee, it does not devolve upon another, though a successor in the trust. In *Hibbard* v. *Lamb*, 1 Ambl. 309 (1755), E. B. by will gave the residue of her estate "to be disposed of in charity to such persons, and in such manner as her (four) executors, or the survivors of them, should think fit." Two of the trustees died, and on a bill to appoint two successors, Ld. HARDWICKE made the appointment, but he said—"The new trustees could not dispose of the residue in charity, for as the testator had conferred that power upon her executors only, the court could not give it to the new trustees."

Of course, if the discretion had been vested in A. B. and *his successors*, then the rule is entirely different. Then the mode of selection is not exhausted by the death of the first trustee. The testator has provided an endless chain. This was the point of the decision in *Lorings* v. *Marsh*, 6 Wall. 337; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364. But suppose no such language of perpetuity is found in the will, it means to say, I give the same to A. B. to be disposed of by him, for such charitable purposes as he may think proper, and if he does not think proper to so dispose of it, I do not give it to charity. If this were distinctly so expressed, unquestionably, even in England, the estate would go to the heirs at law: *De Themmines* v. *De Bonneval*, 5 Russ. 288 (1828). One other test may be suggested. Suppose the executor or trustee named in the will, to whom a fund is given to be disposed of by him to such charities

as he may select, should die *before* the testator and no other is appointed in his place by the testator, what becomes of the fund then? Will it go to the heirs at law, or will an English Court dispose of it in some method to charities? This exact question was answered in favor of the heirs in the late case of *Chamberlayne* v. *Brockett*, 41 L. J. Ch. 789 (1872), in which the testator left a legacy of one hundred pounds to each of several nephews and nieces, "to be applied by each of them to such charitable purposes as each may think most advisable." Some of them died before the testatrix, and the next of kin applied for distribution of such deceased trustee's share among themselves. The Attorney-General contended that such fund should still be devoted to charity, but the Master of Rolls said: "The legacies to such charitable objects as the nephews and nieces shall select, must be considered as lapsed legacies in cases where the persons to select died in the testator's lifetime. The legacies were not given to any particular charity, for then they would be supported; but the charity is to be selected by a person who died before the will came into operation by the testatrix's death, and therefore the object of the gift cannot be ascertained."

If we could properly rest here, the question we are now considering would seem to have but one answer, viz.: that courts of equity, as such, never dispose of such funds. But there is a large class of cases in England which are often relied upon as establishing a different doctrine from that just advanced, but when carefully examined we think may be entirely distinguished from the cases before cited. The most important of them all is *Moggridge* v. *Thackwell*, 7 Ves. 36, before Ld. ELDON in 1802. There the bequest was in these words: "I give all the rest and residue of my personal estate unto James Vaston, of Clapton, Middlesex, gentleman, his executors and administrators, desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen of large families and good characters." Vaston, the trustee, died before the testatrix, but she did not make any new appointment, though aware of his decease. The rest and residue amounted to 50,000 pounds, and upon a bill in equity three questions were elaborately and ably argued, viz.: (1) Whether the charity had wholly failed, and so the property went to the next of kin; (2) If not,

whether it should be disposed of by the King under his sign manual; or (3) Whether it should be distributed according to a scheme prepared by a master, under the direction of the court. And Lord ELDON, with many doubts whether he was justified in taking jurisdiction as equity judge, even in that case, affirmed Lord THURLOW'S decree in the same case made in 1 Ves. 464; 3 Bro. C. C. 517; viz.: that a court of equity, as such, could carry out the trust by scheme, but it was because, and solely because, the testator had indicated the kind or class of persons as the objects of his bounty. Or, as stated in the case by Lord THURLOW, in 1 Ves. 475, "because the testatrix has recommended a more particular charity than the general one," and the decree was made to have particular regard to that recommendation. This still more clearly appears from the report in 3 Bro. C. C. 528. There the *genus* and species were mentioned, but not the individuals. In the case now supposed, neither the individuals nor the species are indicated; nothing but the *genus, i. e.*, "charitable purposes." One case seems to fall on one side of the line, one on the other. And this exact distinction runs through all the cases before and since. Thus in *Attorney-General* v. *Hickman*, 2 Eq. Cas. Ab. 194 (1732), the charity was administered by the court (Lord KING, Ch.), after the trustee's death, because the testator had mentioned "nonconformist ministers" as the objects of his bounty, and only left to the discretion of the trustees "the particular method how to dispose of it." S. C. Kel. 34, No. 24. So in *White* v. *White*, 1 Bro. C. C. 12 (1778), where the legacy was "to the Lying-in Hospital, and if there should be more than one, then to such of them as his executor should appoint." The testator afterward struck out the name of his executor from his will, and died without appointing another. Lord THURLOW sent it to a master to determine to which Lying-in Hospital it should be paid; but it was because the testator had "named a particular charity as a residuary legatee," and the only question was "how the trust should be carried into execution." Precisely the same feature existed in *Mills* v. *Farmer*, 19 Ves. 483 (1815), better reported in 1 Mer. 55, viz.: a mention of some particular objects of the bounty. It reads: "The rest and residue of all my effects, I direct, may be divided for promoting the gospel

in foreign parts, and in England in bringing up ministers in different seminaries, and other charitable purposes as I do intend to name hereafter, after all my worldly property is disposed of to the best advantage." The great question involved was whether, having mentioned some particular objects, the fund was to be lost and go to the heirs, merely because the testator said he intended to mention other charitable purposes, but did not. The decree was made upon a scheme, "regard being particularly had to the charitable intentions denoted by the testator, but not so as to confine the bequest to those only." "It is," said the court, "as if a testator should give his property to A. and B. and such others as he should name, but never named any, A. and B. would not lose their part whatever it be." So in *Attorney-General* v. *Gladstone*, 13 Sim. 7 (1842), the bequest was "to T. R. fifteen thousand pounds, to be by him applied for the use of Roman Catholic priests in and near London, at his absolute discretion." And although T. R. died before the testator, yet the court had no difficulty in disposing of it by a scheme, because the class of beneficiaries was distinctly pointed out by the testator, and the discretion was only as to the particular priests and the amount to be paid to each. So in *Reeve* v. *The Attorney-General*, 3 Hare, 191 (1843), the bequest was to two named societies, in trust to pay "the house rent of seven or more country laborers, who could produce from some clergyman proper certificates of the honesty, sobriety," etc. And although the societies named as trustees renounced the trust, the court distributed the fund by a scheme, because "in this case (p. 197) the objects of the trust are pointed out with great minuteness." See also *Hayter* v. *Trego*, 5 Russ. 113 (1828). So in *Martin* v. *Margham*, 14 Sim. 230 (1844), the specific object of the charity was mentioned, viz.: "The Parish charity schools of this county." Therefore, the expressed object being held a legal impossibility, the court had no difficulty, relying upon *Moggridge* v. *Thackwell*, to carry it out by a scheme, "having regard to the objects specified in the will." So in *Copinger* v. *Crehane*, 11 Ir. Eq. N. S. 429 (1877), the bequest was to Rt. Rev. Wm. Keane, "to be applied by him in his discretion for such charitable purposes as he may think fit, for the purpose of promoting the honor and glory of God, and the advancement and benefit

of the Roman Catholic Religion." The trustee died without exercising the discretion, *inter vivos*, but left a will indicating two specified objects, viz.: the College of Fermoy and the Cathedral at Queenstown. *Held*, that because of this specification of objects, the case was taken out of the class of gifts which required the disposition to be by sign manual, and therefore might be carried out by a scheme, distinguishing *Felan* v. *Russell*, 4 Ir. Eq. 701. So in *Gillan* v. *Gillan*, 1 L. R. Ireland Ch. Div. 114 (1878), a legacy of "Two hundred pounds to some orphanage that I may name hereafter," was held good although the testator died without naming any; because by the use of the word "orphanage" he had specified the objects of his bounty. Just the converse of *Attorney-General* v. *Syderfen*, before stated. *Schouler, Petitioner*, 134 Mass. 426, easily falls into line under this head, for there was a specific object, viz.: "masses," etc.; that is masses and other purposes of a like character.

The reason for this distinction is obvious. Where there is any intimation by the testator as to the objects of his bounty, the courts of equity will take jurisdiction, because they consider themselves bound to conform as near as possible to the wishes of the testator, and this is the meaning of the word *cy-près*, whereas, when the Crown disposes of it, it has the power to act arbitrarily, without any regard to the supposed wishes of the testator; and some of the cases show how far removed the object benefited was from that near the testator's heart. The doctrine of *cy-près* is a *judicial* doctrine, not a ministerial one at all. And after examining all the cases on the subject, Lord ELDON, in 7 Ves. says: "The general principle thought most reconcilable to the cases is, that where there is a general indefinite purpose, not fixing itself upon any object, as *this in a degree does*, the disposition is in the King by sign manual; but where the execution is to be by a trustee, with general, or some objects, pointed out, there the court will take administration of the trust." In that case, there was not only a trustee named, but some objects or class of objects clearly pointed out, viz.: "poor clergymen with large families and good characters." No less than four ear marks to indicate for whom his bounty was intended. But if a trustee be named, and no objects are pointed

out, the circle of application is coextensive with the universe. It might be applied to any one of the ten various classes specified in the Statute of Elizabeth. It might be devoted by the trustee to any one of the one hundred and one objects of charity that have occurred under each of these ten classes. It might be given to private charity or to public institutions, or to beggars at the door. It is open "to the poor, the hungry, the thirsty, the naked, the sick, the wounded, and the prisoner." Can such a charity be judicially administered by any doctrine of *cy-près*? *Cy-près* means "get as near the intention of the testator as you can." When would a court of equity know whether they were anywhere near the intention of the testator? What is there to get near to? To enforce such a bequest would be to create a trust, not to administer it. This is the prerogative of the Crown: not a judicial act at all; it is a mere ministerial one. Or as Perry states it (2 Perry on Trusts, § 719): "It is plain that to divide a fund left to a charity generally, among several asylums, hospitals, or alms-giving institutions, is not a judicial act at all; it is a mere ministerial act, to be regulated by no rules of law, but to be governed by the good sense and sound discretion of the person who makes the division or distribution." In O'Leary on Charitable Uses (1874), p. 182–3, he says—"There is a good deal of confusion in the books as to when the Court and when the Crown, is to have the administration of the fund. One text writer (Boyle) seems to put the case as if it was the single circumstance of the interposition of a trustee that made the difference in the mode of administering the property. But I apprehend that this is not the true rule. I think it appears, upon an examination of the cases, that the Court does not take the administration of the fund, unless when two circumstances have concurred, namely a specification (however vague) of the charitable object, and a nomination of a trustee by the donor or testator. And if these things do not concur, the administration of the charitable fund will go to the Crown. And this is in effect Lord ELDON'S rule." See also 2 Perry on Trusts, § 729. It would seem therefore, that, even in England, a court of equity would not administer the fund, if the trustee in whom the discretion rests, dies without exercising his discre-

tion, unless there be some objects or class of objects mentioned by the testator.

How stands the law in America? Uniformly against it. *Fontain* v. *Ravenel*, 17 How. 369. The testator authorized his executors, or the survivor of them, after his wife's death, "to dispose of the same (the rest and residue) for the use of such charitable institutions in Pennsylvania and South Carolina, as they or he may deem most beneficial to mankind, and so that part of the colored population in each of the said states shall partake of the benefits thereof." The wife survived all the other executors several years, but neither they nor she disposed of the fund to any such institutions, but she distributed it as undisposed of property, after the death of her coexecutors. After her death, the testator's administrator, *de bonis non*, brought a bill against her executor for certain charitable societies of Pennsylvania and South Carolina, to recover the property the widow had so disposed of. *Held*, that even if such a power to these particular persons, by the testator, could be executed by the Chancellor in England, it could not be by any court in the United States, and that the court could not take the fund from the next of kin. And see an elaborate discussion of the subject in *Grimes* v. *Harmon*, 35 Ind. 198. *Beekman* v. *Bonsor*, 23 N. Y. 298. The bequest was in these words: "After the expiration of ten years, or sooner, if my executors find that there will be sufficient funds, I would wish a public dispensary, as in New York, on a similar plan, for indigent persons, both sick and lame, to be attended by a physician elected to the establishment, at their own houses, and also daily at the dispensary; my executors to consult judicious men in Albany, respecting the same, and funds enough to carry on the building and yearly expense; and should there be any overplus, my executors within fifteen years may give it to any other charitable society or societies for relieving the comfortless and indigent they shall select." The executors renounced the trust. *Held*, that even if the bequest were valid, if they had carried it out, yet having renounced the trust it could not be administered by judicial authority, but only by the prerogative power, which did not exist in New York. A bequest of money to the executors, to be applied by them "to such charitable societies for indigent

and respectable persons, especially females and orphans, as they in their discretion shall think of," was held to fail if the executors renounced the trust and discretion reposed in them. See also *Lepage* v. *McNamara*, 5 Iowa, 124, before stated. So in *Zeisweiss* v. *James*, 63 Penn. St. 465 (1870), it was held that although a devise to indefinite charities may be good, if a trustee be named, clothed with discretionary power to carry out the general purposes of the testator, yet if such trustee die or resign, and there is no provision made by the testator for the continuance of the trust, the charity must fail, since the discretion of the first trustee cannot be assumed by the court, nor reposed in a trustee of their selection: and *Fontain* v. *Ravenel*, 17 How. 369, was fully approved, on p. 469. *Bristol* v. *Bristol*, 53 Conn. 242, is also directly in point. The language of Judge GRAY, in the exhaustive opinion in *Jackson* v. *Phillips*, 14 Allen, 576, appears to be in conformity with this view, in which he says: "The second class of bequests which are disposed of by the King's sign manual, is of gifts to charity generally, with no uses specified, no trust interposed, and either no provision for an appointment, or the power of appointment delegated to particular persons who die without exercising it. Boyle on Charities, 238, 239; *Attorney-General* v. *Syderfen*, 1 Vern. 224; s. c. 1 Eq. Cas. Abridge. 96; *Attorney-General* v. *Fletcher*, 5 Law. J. (N. S.), Ch. 75."

No doubt if the trustee accepts and is still living, a court of equity could compel him to execute the trust and make a selection, and would not allow him to keep the fund himself: *Bartlett* v. *Nye*, 4 Met. 378; *Tainter* v. *Clark*, 5 Allen, 66. They could order him to report a scheme as in *Cook* v. *Duckinfield*, 2 Atk. 562; *Pocock* v. *Attorney-General*, 3 Ch. Div. 342, and many other cases. But they could not remove him and appoint another trustee to do it, nor do it themselves, upon a scheme suggested by the Attorney-General. They would have no right to substitute another man's discretion for that of the trustee named, whether it be that of a new trustee, a master of chancery, an attorney-general, or the court. It is elementary law that a power of trust which is purely personal cannot be exercised by another: *Tainter* v. *Clark*, 13 Met. 220; *Down* v. *Worrall*, 1 M. & K. 561. There being, therefore, no method in America

by which a fund so given can be applied to any charitable purpose, and the trustee named not having any personal interest in it, it must go to the heirs at law or next of kin, as intestate estate.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Maine.

WOODMAN *v.* PITMAN AND OTHERS.

Neither the right of traveling upon the ice of a river affected by the tide, nor the right of taking ice therefrom, is an absolute property right in any person. Both are natural or common rights, belonging to the public at large. Though such rights are theoretically open to all, those persons who first take possession of them are entitled to their enjoyment without interference from others, such rights being the subjects of qualified property by occupation.

Each right is relative or comparative, and, when conflicting with the exercise of the other right, is itself to be exercised reasonably. What would be a reasonable exercise of the one or the other, at any particular place, must depend largely upon the benefits which the people at large are to receive therefrom.

The right of passage over the ice for general travel is not the paramount right at such a place as the Penobscot river at Bangor, and for some distance below, where the great body of the ice is annually harvested for the purposes of domestic and foreign trade; the traveler's privilege at such place being of trifling consequence, compared with other interests conflicting with it, and beset with difficulty and danger during the ice-cutting season.

It is the duty of those who appropriate to their use portions of a public river for ice-fields to so guard their fields, after they have been cut into, as not to expose to danger any persons who may innocently intrude upon them.

Although the defendant may have been in fault in leaving his ice-field unprotected against accident, yet, where the plaintiff's servant, knowing the customs of ice-gatherers, willfully left the usual driven track, and drove over a bank of snow by the side of the defendant's ice-field, knowing that he was going upon an ice-field, and that it was dangerous to do so, he was guilty of contributory negligence, and the plaintiff cannot recover for injuries to his property.

ON motion by defendants from Supreme Judicial Court, Penobscot county.

Action on the case to recover damages to plaintiff's property because of alleged negligence of defendants. The verdict was in favor of the plaintiff, and the defendants filed a motion for new trial. The opinion states the material facts.